

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Amendment of Parts 1, 21, 73, 74 and 101 of the	)	WT Docket No. 03-66
Commission's Rules to Facilitate the Provision of	)	RM-10586
Fixed and Mobile Broadband Access, Educational	)	
and Other Advanced Services in the 2150-2162	)	
and 2500-2690 MHz Bands	)	
	)	
Part 1 of the Commission's Rules – Further	)	WT Docket No. 03-67
Competitive Bidding Procedures	)	
	)	
Amendment of Parts 21 and 74 to Enable	)	MM Docket No. 97-217
Multipoint Distribution Service and the	)	
Instructional Television Fixed Service	)	
to Engage in Fixed Two-Way Transmissions	)	
	)	
Amendment of Parts 21 and 74 of the	)	WT Docket No. 02-68
Commission's Rules with Regard to Licensing	)	RM-9178
in the Multipoint Distribution Service and in the	)	
Instructional Television Fixed Service for the	)	
Gulf of Mexico	)	
	)	
Promoting Efficient Use of Spectrum Through	)	WT Docket No. 00-230
Elimination of Barriers to the Development of	)	
Secondary Markets	)	

To: The Commission

**CONSOLIDATED OPPOSITION TO AND  
COMMENTS IN SUPPORT OF  
PETITIONS FOR RECONSIDERATION**

**THE BRS RURAL ADVOCACY GROUP**

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## Summary

In this pleading, the BRS Rural Advocacy Group (the “Group”) responds to a number of arguments raised in petitions for reconsideration of the rules adopted in this proceeding.

The Group strongly opposes those petitions that would restrict incumbent Local Exchange Carriers (“ILECs”) and cable operators from acquiring BRS and EBS spectrum for data purposes. This argument was previously rejected by the Commission, and there still is no evidence in the record to support a departure from Commission policies. The Group members – some of which are ILECs – use BRS and EBS spectrum to provide data services to rural Americans that have no other choice in broadband access. The petitioners ignore the benefits ILECs provide, and instead rely on the contradictory theories that ILECs use spectrum both to foreclose competition and provide too much competition. They present no facts to support either claim, and fail to appreciate that the “substantial service” standard and the secondary market rules already provide the means for the Commission to redress the alleged harms, to the extent they develop in the future.

The Group supports a number of proposals offered by other petitioners. First, as the Group advocated in its petition for partial reconsideration, the Commission should adopt criteria permitting licensees to “opt out” of a transition without having to seek waiver of the Commission’s rules. A waiver process adds uncertainty and delay to a transition process that is inherently complex, to the detriment of MVPDs and transition proponents alike.

Second, the Commission should reconsider its decision to adopt Major Economic Areas (“MEAs”) as the transition areas and instead use Basic Trading Areas (“BTAs”), as a large number of petitioners urged. Rural operators, in particular, will not have the resources

to transition all of the markets in MEAs, many of which bear no relationship to its own market, decreasing the likelihood that rural operators will not be transition proponents. Conversely, rural operators would be better able to pay for transition costs if required to transition only their BTAs. Adopting BTAs as the transition areas also would be consistent with the Commission's policies promoting access to wireless services in rural America.

Third, the Commission should afford a licensee the opportunity to "self transition" its channels, and should adopt its proposal that would permit an analog MVPD to exchange a four-channel license for comparable digital spectrum in the Middle Band Segment. The Group recognizes the benefits associated with using spectrum more efficiently and the opportunities presented by making the Lower Band Segment and Upper Band Segment channels available for future licensing. If the Commission adopts this proposal, it should ensure that the licensee must have the right to state when it makes its election that: (a) it will not be required to exchange its four-channel license for a digital channel until after a new license has been issued for the area and spectrum that includes the analog licensee's GSA and channels; and (b) until the new licensee launches service in the area and on the spectrum that includes the analog licensee's GSA and channels, it can continue to operate under the band plan specified in Section 27.5(i)(1).

Fourth, the Commission should make clear that Advanced Wireless Service auction winners – not transition proponents – will bear responsibility for covering the costs to re-locate channel BRS-1 and BRS-2. The Group also supports the proposal for an alternative band plan for BRS-1 and BRS-2 licensees that have not transitioned. Under this band plan, BRS-1 would be located at 2496-2500 MHz and BRS-2 would be located at 2686-2690 MHz.



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To: The Commission

**CONSOLIDATED OPPOSITION TO AND  
COMMENTS IN SUPPORT OF  
PETITIONS FOR RECONSIDERATION**

The BRS Rural Advocacy Group (the "Group"), a coalition of Broadband Radio Service ("BRS") operators and licensees in rural markets,<sup>1</sup> by counsel, hereby opposes certain petitions for reconsideration filed in this proceeding, and provides comments in support of

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<sup>1</sup> Exhibit 1 hereto contains a list of the Group members, the markets where they operate and a map showing the locations of their main transmit sites and the Basic Trading Areas ("BTAs") and Major Economic Areas ("MEAs") in the upper midwest United States.

other petitions.<sup>2</sup> As discussed in further detail, the Group opposes those petitions that seek to prohibit incumbent Local Exchange Carriers (“ILECs”) and cable operators from holding BRS and EBS spectrum for data services. The Group supports those petitions that advocate the following:

- (1) adoption of criteria permitting licensees to automatically “opt out” of transitions to the new band plan without having to seek waiver from the Commission, which will help preserve choice in multichannel video programming distribution (“MVPD”) services;
- (2) reduction in the size of transition areas from MEAs to BTAs, which will facilitate the ability of rural operators to transition to the new band plan;
- (3) adoption of a “self-transition” option for those licensees that are not included in a transition commenced during the Initiation Period, including the option to exchange analog spectrum for digital spectrum in the Middle Band Segment (“MBS”);
- (4) payment of BRS-1 and BRS-2 relocation costs by winners of the Advanced Wireless Service (“AWS”) auction for the 2150-2160 MHz band, which will provide greater cost certainty and would be consistent with Commission practices.
- (5) adoption of an alternative band plan to accommodate relocated BRS-1 and BRS-2 channels for licensees that do not transition, which will provide certainty in the location and amount of spectrum.

### Introduction

In its Petition for Partial Reconsideration, the Group asked the Commission to reconsider its decision to require BRS and EBS licensees to seek waiver of the Commission’s rules if they do not want to transition to the new band plan.<sup>3</sup> In reaching this decision,

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<sup>2</sup> See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 04-135, 19 FCC Rcd 14165 (2004) (“BRS/EBS Order”). Notice of the filing of petitions for reconsideration was published in the Federal Register on February 7, 2005. See 70 Fed.Reg. 6440 (Feb. 7, 2005). References to the Report and Order portion of that document will be defined as the “BRS/EBS Order.” References to the Further Notice of Proposed Rule Making portion of that document will be defined as the “FNPRM.”

<sup>3</sup> Petition for Partial Reconsideration of the BRS Rural Advocacy Group filed January 10, 2005 (“Group Petition”).



which was not addressed in any of the pleadings leading to adoption of the *BRS/EBS Order*, the Commission rejected the Coalition's proposal to permit licensees to "opt out" if they used more than seven digital channels or provided service to at least five percent of the households in their respective geographic service areas ("GSAs").<sup>4</sup> To further accommodate the needs of rural MVPDs, the Group proposed that the Commission should also permit a BRS or EBS licensee (or its affiliate) to "opt out" of a transition if: (a) its geographic service area ("GSA") covers a county defined by the Commission as a "rural area;" and (b)(i) it provides MVPD and/or broadband service to more than 15 percent of the households within the portion of any "rural area" that is within the GSA; or (ii) it is part of a system that provides MVPD service to at least 500 customers.<sup>5</sup> The Group also urged the Commission to require transition proponents to cover the reasonable costs of minor technical modifications that MVPDs would incur to help facilitate transitions in nearby markets,<sup>6</sup> and to clarify that any licensee or operator that "opts out" of a transition will not be deemed to hold "un-transitioned" spectrum that would be subject to the involuntary exchange of licensed spectrum for bidding offset credits.<sup>7</sup>

### **Discussion**

#### **I. THE COMMISSION SHOULD NOT RESTRICT ILECs FROM ACQUIRING BRS OR EBS SPECTRUM.**

Many of the Group members are ILECs, or subsidiaries or affiliates of ILECs, and are deeply concerned that certain petitioners seek to restrict them from acquiring BRS and

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<sup>4</sup> See "A Proposal for Revising the MDS and ITFS Regulatory Regime," filed October 7, 2002 by the Wireless Communications Association International, Inc., the National ITFS Association and the Catholic Television Network ("Coalition Proposal") at Appendix B, p.17; Supplement to Coalition Proposal filed November 14, 2002 at 4-5.

<sup>5</sup> See Group Petition at 14-18.

<sup>6</sup> See *id.* at 18-19.

<sup>7</sup> See *id.* at 19.

EBS spectrum to provide data services in rural markets.<sup>8</sup> As has already been documented in this proceeding, the Group members make use of the spectrum they have to provide MVPD and data services to rural Americans that might otherwise have no other choice in accessing such services.<sup>9</sup> Prohibiting the Group members and other ILECs and cable operators from acquiring BRS and EBS spectrum would be contrary to law, contrary to policy and contrary to the interests of rural Americans.

In the *BRS/EBS Order*, the Commission declined to adopt the eligibility restrictions the petitioners now seek to impose.<sup>10</sup> The Commission stated that there were no “relevant market facts and circumstances sufficient to demonstrate that the eligibility of [DSL providers and cable operators] is likely to result in substantial competitive harm or that, even if specific markets experienced harm to competition, the eligibility restrictions they advocate would be effective in eliminating that harm.”<sup>11</sup> The Commission thus did not limit in any way the ability of DSL providers from holding BRS and EBS spectrum rights, and limited cable operators from holding such rights only to the extent Section 613(a) of the Communications Act of 1934, as amended, restricted them from providing MVPD service on BRS and EBS spectrum in areas overlapping their cable franchise areas.<sup>12</sup>

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<sup>8</sup> See Petition for Reconsideration of C&W Enterprises, Inc. filed January 10, 2005 (“C&W Petition”) at 5; Petition for Reconsideration of Cheboygan-Otsego-Presque Isle Educational Service District/PACE Telecommunications Consortium filed January 10, 2005 (“COPIES/PACE Petition”) at 4-5; Petition for Reconsideration of Digital Broadcast Corporation filed January 10, 2005 (“DBC Petition”) at 5; Petition for Reconsideration of SpeedNet, L.L.C. filed January 10, 2005 (“SpeedNet Petition”) at 4-5; Petition for Reconsideration of Wireless Direct Broadcast System filed January 10, 2005 (“WDBS Petition”) at 4-5.

<sup>9</sup> See Group Petition at 3-5.

<sup>10</sup> The *BRS/EBS Order* appears to use the terms “DSL providers” and “ILECs” interchangeably. The Group points out that one can be an ILEC that does not provide DSL service, and one can provide DSL service without being an ILEC. The Group urges the Commission to confirm that there is no restriction on either ILECs or DSL providers in holding BRS and EBS spectrum rights.

<sup>11</sup> *BRS/EBS Order* at ¶175, citing Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Notice of Proposed Rulemaking*, 18 FCC Rcd 6722 (2003) at 6773-74.

<sup>12</sup> See also Section 27.1202(a), which implements Section 613(a) of the Act and describes certain cases where the general restriction would not apply.



The petitioners raise no new arguments, instead relying on innuendo and conclusory statements that are devoid of any factual support. Indeed, the petitioners concede their fallibility in arguing that use of BRS/EBS spectrum for data services “is a recent development” for which, by definition, there can be no evidence available to support imposing eligibility restrictions. To quote BellSouth, “there is no product market or geographic market for the rebanded MMDS and ITFS spectrum, only a nascent marketplace with unproven technology, unknown geographic and product markets and untested business cases.”<sup>13</sup> Clearly, the petitioners have not satisfied their burden to support eligibility restrictions and countermand the Commission’s policies disfavoring eligibility restrictions. On this basis alone, the petitions should be summarily rejected.

Without any facts, the petitioners resort to making conflicting statements, on one hand accusing ILECs and cable operators of being too competitive<sup>14</sup> and on the other hand suggesting that they will warehouse spectrum.<sup>15</sup> Neither of these claims is true. In fact, the Group members are making widespread use of BRS and EBS spectrum to provide both MVPD and data services. In many cases, they provide the only means by which rural Americans can obtain broadband access, given the lack of wired solutions such as DSL or cable. They certainly have no incentive to warehouse, either, in light of the fact that a “substantial service” build-out requirement will ensure that all BRS/EBS licensees, including DSL providers and cable operators, will face the loss of their licenses if they do not provide service. Contrary to the petitioners’ misguided claims, the Group members are not

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<sup>13</sup> Comments of BellSouth Corporation, *et al.*, filed September 8, 2003 (“BellSouth NPRM Comments”) at 21.

<sup>14</sup> See C&W Petition at 5; COPIES/PACE Petition at 4-5; DBC Petition at 5; SpeedNet Petition at 5; WDBS Petition at 5 (“[cable operators’] entry into this service has been restricted has been a relief, as *both industries have long histories of competitive business practices*”) (emphasis added).

<sup>15</sup> See C&W Petition at 5; COPIES/PACE Petition at 4-5; DBC Petition at 5; SpeedNet Petition at 5; WDBS Petition at 5 (ILECs and cable operators “would further prohibit the development of such systems and encourage warehousing of spectrum by large entities hoping to delay or quash competition”).

“preventing competition whenever possible” or “demanding spectrum used by their competitors.”<sup>16</sup>

Apparently sensing that their case is totally without merit, two of the petitioners argue that if the Commission does not impose an absolute prohibition, it should at least prevent ILECs and cable operators from holding licenses in the Middle Band Segment (“MBS”).<sup>17</sup> According to these petitioners, MBS channels “are specifically designated for high power video operations, which the Commission has confirmed that such entities are prohibited from using.”<sup>18</sup> As the Commission is well aware, however, the Commission’s rules place no restrictions on the use of MBS spectrum for low power services, non-video services or any other service that complies with the Commission’s technical and operational rules. Here again, the petitioners reveal their fear of competition in asserting that ILECs and cable operators should be prevented from developing “any competitive video services which [DBC and WDBS] hope[] to develop on the Mid-Band channels.”<sup>19</sup> This transparent effort to foreclose competition – especially in rural America – contravenes Commission policy and must be rejected.

If the Commission is concerned about warehousing and competition – and there is no evidence whatsoever of either – it has the tools to protect against these potential harms. To ensure that BRS and EBS licensees do not acquire spectrum for anti-competitive purposes, the Commission has tentatively adopted a “substantial service” standard that will encourage use of spectrum.<sup>20</sup> To ensure against market concentration, the Commission has adopted a case-by-case approach to review specific transactions. In fact, in its secondary

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<sup>16</sup> C&W Petition at 5; COPIES/PACE Petition at 4-5; DBC Petition at 5; SpeedNet Petition at 5; WDBS Petition at 5

<sup>17</sup> See DBC Petition at 6; WDBS Petition at 6.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See FNPRM at ¶321.

markets proceeding, the Commission has exempted from immediate processing any assignment, transfer or spectrum leasing arrangement application involving spectrum “that may be used to provide interconnected mobile voice and/or data services” – including specifically BRS spectrum – in areas where the licensee already holds an attributable interest.<sup>21</sup>

The advocates for eligibility restrictions for ILECs and cable operators have absolutely no factual support, argue internally contradictory positions and fail to appreciate that existing rules will remedy any potential harm that may arise in the future. Moreover, their views ignore the benefits that ILECs, such as the Group members, provide to rural Americans that would have no other means to obtain broadband access. The petitions must be rejected.

## **II. THE PETITIONS DEMONSTRATE STRONG SUPPORT FOR ADOPTING RULES PERMITTING CERTAIN MVPDs TO “OPT OUT” OF A TRANSITION WITHOUT HAVING TO SEEK A WAIVER.**

A number of petitioners agreed with the Group that the Commission should reverse its decision to permit licensees to “opt out” of a transition only upon grant of a waiver. Most notably, the Wireless Cable Association International, Inc. (“WCA”), one of the initial architects of the Coalition’s self-effectuating “opt-out” proposal, forcefully noted that *“not one party participating in this proceeding opposed providing an automatic opt-out right to any MVPD that serves more than 5% of the population or that is providing service on more than seven digitized channels.”*<sup>22</sup> WCA observed that a waiver process added “uncertainty as to whether those MVPDs can [ ] continue operations” and contravened the Commission’s desire to substitute streamlined

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<sup>21</sup> See, e.g., Section 1.9030(e)(2)(i)(A).

<sup>22</sup> See Petition for Partial Reconsideration of the Wireless Communications Association International, Inc. filed January 10, 2005 (“WCA Petition”) at 27 (emphasis in original).



regulatory processes for case-by-case adjudications.<sup>23</sup> WCA also explained that the automatic “opt-out” process would be “demonstrably less burdensome” on both the MVPD and the transition proponent and would, contrary to the Commission’s view, complicate the transition process.<sup>24</sup> WCA concluded that the Coalition “opt out” plan “did not propose that every MVPD be entitled to opt-out of the transition,” but rather “struck a delicate balance by carefully limiting eligibility to only those MVPDs with the most compelling cases.”<sup>25</sup>

W.A.T.C.H. TV Company (“W.A.T.C.H. TV”), an MVPD in the Lima, Ohio area, echoed many of the concerns expressed by WCA.<sup>26</sup> Most significantly, W.A.T.C.H. TV demonstrated that, if it were not permitted to “opt out” and its digital MVPD service were relegated to the MBS, it would suffer a 75 percent reduction in the number of programming streams it could provide to its customers.<sup>27</sup> W.A.T.C.H. TV further noted that its \$20 million investment in providing service over many years would be unfairly “nullif[ied]” – a draconian sanction for an operator that had a history of complying with the rules and providing MVPD service to thousands of subscribers in small communities.<sup>28</sup>

Similarly, Central Texas Communications, Inc. (“CTC”), an operator providing MVPD and broadband service in several small communities, asserted that the Coalition’s “opt-out” plan would “make the transition process more predictable, not less.”<sup>29</sup> In discussing the “high hurdle” licensees would need to overcome to obtain a waiver, CTC stated that:

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<sup>23</sup> *Id.* at 28.

<sup>24</sup> *Id.* at 29.

<sup>25</sup> *Id.* at 30.

<sup>26</sup> See Petition for Reconsideration filed January 10, 2005 (“W.A.T.C.H. Petition”).

<sup>27</sup> See *id.* at 4.

<sup>28</sup> *Id.* at 8. See also Petition for Reconsideration or Clarification filed by Choice Communications, Inc. filed January 10, 2005 (“Choice Petition”) at 6.

<sup>29</sup> See Petition for Reconsideration of Central Texas Communications, Inc. filed January 10, 2005 (“CTC Petition”) at 9.

because the FCC's waiver process is so arduous, it subjects existing operators to a great deal of uncertainty as to whether or not [they] will be allowed to continue its existing high-power video business. Such uncertainty in an already complicated marketplace foreshadows an extremely grim outlook for rural MVPDs.<sup>30</sup>

The Commission can remedy the uncertain, burdensome and time-consuming outcome that will result from an "opt-out" waiver process by adopting the Coalition's proposal, to the benefit of rural MVPDs that have complied with the rules and rural Americans who enjoy the competitive choice they offer.<sup>31</sup>

### **III. ADOPTION OF BTAs AS THE TRANSITION AREA WOULD FURTHER THE INTERESTS OF RURAL SERVICE PROVIDERS, FACILITATE TRANSITIONS AND LIKELY REDUCE THE NUMBER OF "OPT-OUTS."**

In the *BRS/EBS Order*, without any public support, the Commission determined that any licensee that desired to be a transition proponent would be required to transition to the new band plan all licensees having centroids anywhere in the MEA.<sup>32</sup> No issue received more opposition. At least 12 petitioners asked the Commission to reverse this decision and reduce the size of the transition areas to BTAs, a position with which the Group wholeheartedly agrees.<sup>33</sup>

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<sup>30</sup> *Id.* at 10. *See also* Choice Petition at 6.

<sup>31</sup> CTC proposed a third benchmark by which BRS and EBS licensees could "opt out" of a transition. Under this plan, any licensee who's GSA covered a "rural area" would be eligible to "opt out" if it provided video and/or broadband services to 500 or more subscribers on 20 or more co-located channels (or as few as 11 channels if EBS channels could not have been obtained). *See* CTC Petition at 11. Blooston, Mordkofsky, Dickens, Duffy & Prendergast ("Blooston") proposed an alternative to the "opt out" in which rural BRS and EBS licensees could continue to operate on their existing channels until January 10, 2013, five years after the end of the transition period. *See* Petition for Reconsideration and Clarification filed January 10, 2005. The Group does not oppose either of these proposals, so long as the Commission also adopts the Group's plan that would permit a BRS or EBS licensee (or its affiliate) to "opt out" of a transition if: (a) its GSA covers a "rural area;" and (b)(i) it provides MVPD and/or broadband service to more than 15 percent of the households within the portion of any "rural area" that is within the GSA; or (ii) it is part of a system that provides MVPD service to at least 500 customers.

<sup>32</sup> *See* Section 27.1231(a).

<sup>33</sup> *See, e.g.,* Petition for Partial Reconsideration of Nextel Communications at 4; WCA Petition at 6; Petition for Partial Reconsideration filed January 10, 2005 ("Plateau Petition") at 5; Petition for Reconsideration of the Catholic Television Network and the National ITFS Association filed January 10, 2005 ("CTN/NIA Petition") at 4; Sprint Petition for Reconsideration filed January 10, 2005 ("Sprint Petition") at 3; SpeedNet Petition at 2-3.



The Commission's decision to require transitions by MEA contravenes its own policies and would have an especially harsh impact on wireless operations in rural America. In its *Rural Order* released less than six months ago, the Commission adopted rules and policies designed "to promote access to spectrum and facilitate capital formation for entities seeking to serve rural areas or improve service in rural areas."<sup>34</sup> The Commission recognized that the size of the geographic service areas of rural wireless service providers is a critical factor in facilitating deployment of advanced wireless services and fostering economic development, stating that:

We affirm that we will continue to establish licensing areas on a service-by-service (or band-by-band) basis as appropriate, based upon the flexibility that such an approach provides and our past experience in determining the initial size of service areas. *We also reaffirm that when developing rules for licensing individual services, we will consider using smaller service areas in some spectrum blocks in order to encourage deployment in rural areas for the service in question.*<sup>35</sup>

The use of MEAs plainly contradicts this clear directive. As WCA noted, "[t]he Commission's approach is exactly the opposite of the market-driven regulatory paradigm it is purportedly striving for in rural areas."<sup>36</sup>

If allowed to stand, the use of MEAs as the transition area would have a profound adverse effect on the members of the Group. Many of the Group members operate systems located within the Minneapolis-St. Paul MEA, a gigantic area that includes the entire state of Minnesota, almost all of the state of North Dakota, most of the state of South Dakota, and parts of the states of Wisconsin, Iowa, Nebraska and Montana.<sup>37</sup> Within the Minneapolis-St. Paul MEA there are approximately 28 separate BTAs and probably a similar number of

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<sup>34</sup> Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, WT Docket No. 02-381, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 04-166, released September 27, 2004 ("Rural Order"), at ¶1.

<sup>35</sup> *Id.* at ¶2 (emphasis added).

<sup>36</sup> WCA Petition at 11.

<sup>37</sup> See map at [Exhibit 1](#), which shows the location of the BTAs that are within the Minneapolis-St. Paul MEA (MEA 20) and the Des Moines MEA (MEA 21).



BRS/EBS systems. Thus, under the Commission's standard, any one of the members would be responsible for transitioning all of these markets, leading to the absurd result that an operator in Eau Claire, Wisconsin would be required to transition a system in Williston, North Dakota more than 700 miles away. As Sprint stated, and as the above examples illustrate, "transitioning on an MEA basis would require that proponents identify and map out transition requirements for unfamiliar territory and, in many cases, bear costs and other transition burdens that may offer little return to the proponent's fractional operations within the MEA."<sup>38</sup>

As another example, Evertek, Inc., which operates systems in northwest Iowa, would be required to transition both the Minneapolis-St. Paul MEA and the Des Moines MEA.<sup>39</sup> Requiring transition of nearly 40 BTAs in two separate MEAs virtually assures that Evertek will not be a transition proponent.

By contrast, *in some cases a Group member is the only BRS/EBS operator in the BTA, and it thus would have no other market to transition.* For example, Northern Wireless Communications, Inc. is the only operator with centroids in the Aberdeen BTA. Polar Communications and United Telephone Mutual Aid Corporation are the only operators with centroids in the Grand Forks BTA. Santel Communications Cooperative, Inc. is the only operator with centroids in the Mitchell BTA. Given the large number of systems in the MEA and the enormous area involved, it cannot reasonably be expected that any of these systems would derive any benefit whatsoever in transitioning other systems in the MEA. Conversely, by requiring transitions on a BTA basis, it can be expected that more licensees will have the resources to transition. First, as the above discussion makes clear, transitioning by BTA would be much less expensive for rural providers to accomplish. Second, because in many

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<sup>38</sup> Sprint Petition at 3. *See also* Plateau Petition at 5.

<sup>39</sup> *See* map at [Exhibit 1](#).

rural BTAs there is only one operator – and thus only one likely proponent – there would be no other system to involve in a transition, and fewer licensees can be expected to exercise “opt out” rights. These benefits will no doubt encourage those Group members that want to provide low-power services to transition their BTAs and hasten the nationwide transition to the new band plan.<sup>40</sup>

The Commission can take one additional step to encourage deployment of BRS and EBS spectrum in rural America. In some cases, rural operators purchased BTA authorizations at the auction that concluded in 1996 with the belief that they would be able to apply for vacant EBS spectrum under the “wireless cable” exception specified in former Section 74.990. Unfortunately, and through no fault of their own, the Commission has not accepted applications for EBS channels since 1995, depriving them of the opportunity to increase system capacity and add additional services. The Group therefore urges the Commission to permit holders of authorizations for BTAs that have not transitioned to apply for vacant EBS spectrum at the earliest possible time, consistent with the gating criteria and other restrictions of Section 74.990.<sup>41</sup>

#### **IV. THE COMMISSION SHOULD PERMIT LICENSEES TO “SELF-TRANSITION” AND EXCHANGE ANALOG CHANNELS FOR DIGITAL CHANNELS IN THE MIDDLE BAND SEGMENT.**

A number of petitioners asked the Commission to afford BRS and EBS licensees an opportunity to “self-transition” their licensed channels if no proponent has initiated a transition within the three-year transition period.<sup>42</sup> Of these, the Group endorses WCA’s proposal, which would afford a licensee a reasonable period following the Initiation Plan deadline to notify the Commission that it will either: (a) self-transition to the new spectrum

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<sup>40</sup> See Plateau Petition at 10 (BTA transitions will “empower[] rural licensees to rapidly transition to the new band plan”).

<sup>41</sup> See FNPRM at ¶¶349-350.

<sup>42</sup> See, e.g., CTN/NIA Petition at 5-9; WCA Petition at 34.

plan; (b) exchange all of its spectrum for bidding credits; or (c) vacate its Lower Band Segment (“LBS”) and Upper Band Segment (“UBS”) spectrum in exchange for financial assistance in migrating operations to the MBS.<sup>43</sup>

This last alternative appears to be modeled on a proposal in the *FNPRM* that would permit a licensee desiring to continue high-power operations to retain its GSA rather than receive a bidding credit offset.<sup>44</sup> Under this plan, that licensee would exchange its four-channel license for a digital channel in the MBS. As the Commission explained, in many cases a licensee could continue offering the same services on six megahertz of digital MBS spectrum that it currently offers on 24 megahertz of interleaved analog spectrum.<sup>45</sup>

Recognizing that some EBS and BRS licensees may have difficulty financing spectrum relocation, the Commission also proposes that the subsequent auction winner pay the incumbent’s relocation costs.<sup>46</sup> The Commission proposes a process by which licensees would file a relocation plan that estimates itemized costs for the relocation. Licensees could recover reasonable costs incurred prior to the filing date and reasonable costs arising after that date that were less than or equal to the estimated costs.<sup>47</sup> Disputes concerning the reasonableness of costs would be determined by binding arbitration.

The Group generally supports this approach. First, it provides an opportunity for rural MVPDs to provide notice of its intentions at the same time as other licensees that may want to self-transition, thereby remaining consistent with the Commission’s plan for the

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<sup>43</sup> See WCA Petition at 34.

<sup>44</sup> See *FNPRM* at ¶¶313-314. The Group did not file Comments in response to the *FNPRM*. However, given the inextricable link between the transition issues subject to reconsideration and the post-transition issues, the Group is addressing these issues in a single document.

<sup>45</sup> *Id.* at ¶314.

<sup>46</sup> *Id.* at ¶315.

<sup>47</sup> *Id.* at ¶317.



transition period to have a firm deadline.<sup>48</sup> Second, it would allow rural MVPDs to convert to digital service without any loss in the number of programming streams a subscriber can receive. Third, it provides cost certainty to both incumbent MVPDs as well as auction participants prior to the auction, thereby promoting investment. Fourth, it ensures that any cost disputes would be resolved within a reasonable time period.

The Group is concerned, however, about cost recovery in the unlikely event that no party purchases the area and spectrum that includes a licensee's GSA and channels. To ensure against the possibility that a licensee intending to migrate from analog to digital spectrum would be forced to cover the migration costs itself, the licensee must have the right to state when it makes its election that: (a) it will not be required to exchange its four-channel license for a digital channel until after a new license has been issued for the area and spectrum that includes the analog licensee's GSA and channels;<sup>49</sup> and (b) until the new licensee launches service in the area and on the spectrum that includes the analog licensee's GSA and channels, it can continue to operate under the band plan specified in Section 27.5(i)(1).

Finally, as the Group advocated in its Petition, the Commission should make clear that if a licensee does not transition, "opt out" of a transition, or exchange its analog channels for digital MBS spectrum and financial support, it will retain its license and its spectrum will not be treated as "un-transitioned" spectrum for future auction purposes.

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<sup>48</sup> The Commission should make clear that the self-transition option will be available to any licensee that previously "opted out" of a transition.

<sup>49</sup> The Commission also should make clear that this spectrum exchange does not apply to the BRS-1 and BRS-2 channels, which are subject to the separate relocation procedures. *See* Part V, *infra*.

**V. THE COMMISSION MUST PROVIDE FOR COMPENSATION AND ADEQUATE REPLACEMENT SPECTRUM FOR BRS-1 AND BRS-2 LICENSEES.**

As the Group showed in its Petition, its members make substantial use of spectrum at 2150-2160 MHz for upstream data communications.<sup>50</sup> This spectrum has proved to be especially useful to rural MVPDs that have added first-generation wireless broadband to the suite of services they provide. In order to accommodate AWS, however, the Commission has determined that licensees will be involuntarily relocated to other spectrum in the 2496-2690 MHz band.<sup>51</sup>

The Group has two concerns about the relocation process. First, as both WCA and Sprint have requested in light of language in the *BRS/EBS Order* that could be misconstrued, the Commission must make clear that AWS auction winners – *not* BRS/EBS transition proponents – must cover the costs to relocate BRS-1 and BRS-2 to alternative spectrum in the 2495-2690 MHz band.<sup>52</sup> Any contrary decision would be inconsistent with Commission policy<sup>53</sup> and would impose severe financial constraints on the ability of rural licensees to transition.

Second, the Group shares WCA's concern that the *BRS/EBS Order* does not provide for the allocation of replacement BRS-1/2 spectrum where the licensee has "opted out" of the transition.<sup>54</sup> Specifically, the relocation of BRS-1 to 2496-2502 MHz and the relocation of BRS-2 to 2618-2624 MHz, as specified in the new band plan, would overlap a portion of

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<sup>50</sup> See Group Petition at 3-4. See also Opposition of the BRS Rural Advocacy Group to Petition for Reconsideration of Globalstar LLC filed October 27, 2004 regarding Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands, *Report and Order, Fourth Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 13556 (2004).

<sup>51</sup> See Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Services, ET Docket No. 00-258, *Second Report and Order*, 17 FCC Rcd 23193 (2002).

<sup>52</sup> See WCA Petition at 16; Sprint Petition at 7-8.

<sup>53</sup> See Sprint Petition at 7 and n.12.

<sup>54</sup> See WCA Petition at 31-33.

Channel A1 (2500-2502 MHz) and Channels F2 (2618-2620 MHz) and E3 (2620-2624 MHz) under the interleaved band plan. In cases where licensees have “opted out” of the transition, these channels may remain in use. Given the importance of BRS-1 and BRS-2 to provide upstream data communications in rural areas, this result would be untenable.

To address these circumstances, WCA proposed an alternative whereby BRS-1 would be relocated to 2496-2500 MHz and BRS-2 would be relocated to 2686-2690 MHz.<sup>55</sup> Although this reduces the total licensed spectrum to 8 MHz, the Group agrees with this plan, *so long as an overlap with a licensed channel exists*. In cases where, for instance, Channel A1 is not providing service in the un-transitioned market, the BRS-1 licensee should be entitled to the full 6 MHz at 2496-2502 MHz until there is a new EBS licensee on that channel. Similarly, if Channels F2 and E3 are not providing service in the un-transitioned market, the BRS-2 licensee should be entitled to the full 6 MHz at 2618-2624 MHz until there is a new licensee on that channel.

### **Conclusion**

In view of the foregoing, the BRS Rural Advocacy Group respectfully requests reconsideration of the *BRS/EBS Order* to the extent discussed above and in its Petition.

Respectfully submitted,

**THE BRS RURAL ADVOCACY GROUP**

February 22, 2005

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<sup>55</sup> *Id.* at 32.



**Exhibit 1**

**The BRS Rural Advocacy Group<sup>1</sup>**

**Central Dakota TV, Inc.**

Carrington-Jamestown, ND

**Evertex, Inc.**

Palmer, IA

Sioux City, IA

Spencer, IA

**Northern Wireless Communications, Inc.**

**(formerly Northern Rural Cable TV Cooperative, Inc.)**

Aberdeen-Bath, SD

Pierre, SD

**Polar Communications**

Grand Forks, ND

Lakota, ND

Robbin, MN

Thief River Falls, MN

**Santel Communications Cooperative, Inc.**

Mitchell, SD

Mt. Vernon, SD

**Starcom, Inc.**

Fairmont, MN

**United Telephone Mutual Aid Corporation**

Egeland, ND

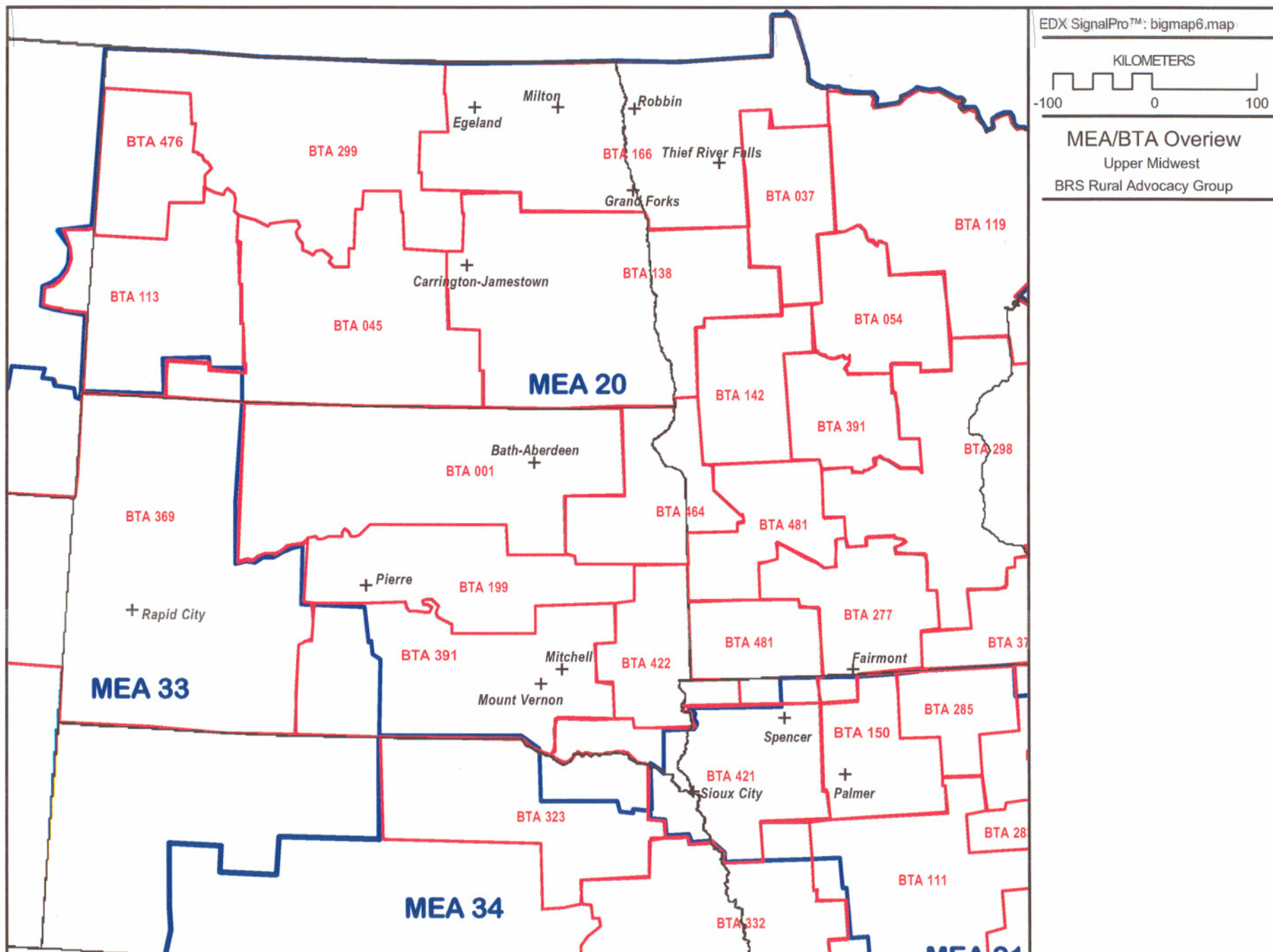
Milton, ND

**West River Cooperative Telephone Co. and G.W. Wireless Incorporated Partnership**

Rapid City, SD

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<sup>1</sup> Northwest Communications Cooperative has elected not to participate in these Comments.



Certificate of Service

I, Kenneth Wolin, Legal Assistant at the firm of Rini Coran, PC, do certify that I have caused a copy of the foregoing Consolidated Opposition to be sent First Class United States mail, postage prepaid to the following parties:

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